MORGAN, LEWIS & BOCKIUS LLP
ROBERT E. GOODING, JR. (SBN 50617)
JENNIFER R. BAGOSY (SBN 223145)
5 Park Plaza, Suite 1750
Irvine, CA 92614
Tel: 949.399.7000
Fax: 949.399.7001
E-mail: rgooding@morganlewis.com
E-mail: jbagosy@morganlewis.com

MARC J. SONNENFELD (Admitted *Pro Hac Vice*)
KAREN PIESLAK POHLMANN (Admitted *Pro Hac Vice*)
1701 Market Street
Philadelphia, PA 19103-2921
Tel: 215.963.5000
Fax: 215.963.5001
E-mail: msonnenfeld@morganlewis.com
E-mail: kpohlmann@morganlewis.com

[*Additional counsel appear on signature page*]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD GAMMEL, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

HEWLETT-PACKARD COMPANY, LÉO APOTHEKER and CATHERINE A. LESJAK,

Defendants.

Case No. SACV11-01404 AG (RNBx)

OMNIBUS REPLY IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT

Judge: Hon. Andrew J. Guilford
Dept.: Courtroom 10D
Hearing Date: August 6, 2012
Time: 10:00 a.m.

MONIQUE E. CHO (SBN 251949)
300 South Grand Avenue
Los Angeles, CA 90071-3132
Tel: 213.612.2500
Fax: 213.612.2501
E-mail: mcho@morganlewis.com

GIBSON, DUNN & CRUTCHER, LLP
DEAN J. KITCHENS (SBN 82096)
DANIEL S. FLOYD (SBN 123819)
DAVID HAN (SBN 247789)
333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel: 213.229.7000
Fax: 213.229.7520
E-mail: dkitchens@gibsondunn.com
dfloyd@gibsondunn.com
dhan@gibsondunn.com

Attorneys for Defendant
HEWLETT-PACKARD COMPANY

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I. INTRODUCTION[1]

In their Omnibus Memorandum Of Points And Authorities In Opposition to Defendants' Motions To Dismiss First Amended Complaint ("Opposition" or "Opp."), Lead Plaintiffs perform an abrupt about-face. Abandoning the FAC's central theory that HP misled investors because it in fact had no plan or commitment to develop webOS-based products at all, Plaintiffs now recast their claim, asserting that HP misled the market by falsely telling investors that it was committed to constructing an "entire ecosystem" of webOS connected products and "by repeatedly stating webOS PCs and printers would be developed and introduced ***within a year***." Opp. at 3 (emphasis in original). Over and over, Plaintiffs refer to "the core allegation that Defendants misrepresented ***when*** webOS PCs and printers would be introduced." *Id.* at 18 n.7 (emphasis in original); *see also, e.g.*, *id.* at 22 ("the Complaint alleges that Defendants' statements regarding when webOS printers or PCs would be introduced to the market was false"); *id.* at 25 ("Defendants falsely led the market to believe that HP was committed to expanding that ecosystem to include 'millions' of PCs and printers in a specific time frame of a year"). Thus, Plaintiffs acknowledge their claim is both entirely forward-looking and narrowly focused on HP's development of a subset of webOS products.

Plaintiffs' new theory is even more flawed and irrational than the theory advanced in the FAC – and refuted in Defendants' Motions to Dismiss – that HP was never "committed" to webOS or the TouchPad. The Opposition implicitly concedes that the facts show that HP was committed to developing the TouchPad and other webOS-enabled devices. *Id*. at 24-25. But it now contends that Defendants' challenged statements – which span several months during an ongoing

[1] Capitalized terms in this Reply have the same meaning as in HP's Motion to Dismiss First Amended Class Action Complaint ("HP Br.") and the Memorandum of Points and Authorities in Support of Individual Defendants' Motion to Dismiss First Amended Class Action Complaint ("Ind. Br."). Unless otherwise noted, all emphasis is added, and all citations are omitted.

product development process – were all false, taken collectively, because Mr. Bradley and Mr. Apotheker allegedly promised in early 2011 that webOS would be on PCs and printers by the end of the year but had knowledge that that would be impossible. They do not even attempt to make such a claim as to Ms. Lesjak.

The arguments advanced in the Opposition are meritless, and the FAC should be dismissed because:

First, nowhere in the FAC do Plaintiffs allege that Defendants ever promised webOS would be available on PCs and printers by a date certain. Plaintiffs' arguments distort the actual statements at issue and instead advance unwarranted inferences based on broadly worded aspirations and goals – not guarantees. Unfortunately for Plaintiffs, the law does not treat such goals as promises. If it were otherwise, countless companies would be subject to securities fraud liability for common aspirational statements. Such statements constitute nothing more than non-actionable puffery.

Second, even if some of Defendants' statements about the release of webOS on PCs and printers could be construed to suggest that Defendants promised to deliver them within a specific time frame, Plaintiffs fail to meet their burden of showing how these statements were false when made. The development of webOS was an ongoing process, and Defendants' purported promises were made early in the putative class period. Plaintiffs do not plead sufficient facts to show that at the time the supposed "promises" were made and development efforts were ongoing, the promises were unattainable. The FAC relies on CW allegations for support of the alleged falsity, but those allegations lack the requisite foundation of personal knowledge and other critical details and are based on unreliable hearsay.

Third, the FAC does not adequately plead that the promises, to the extent any were made, were knowingly false. The statements about putting webOS on PCs and printers in the future were forward-looking, and, therefore, Plaintiffs must

plead particularized facts showing ***actual*** knowledge that such statements were false. Instead, Plaintiffs concede just the opposite, arguing that "Defendants, seeking to compete in the rapidly growing market for mobile, web-connected devices, knowingly and recklessly made false statements that did not reflect the true stage of development of those devices. ***When it became apparent that reality could not catch up to their false pronouncements***, Defendants were forced to disclose the truth." *Id*. at 41 n.17. By acknowledging that it was not "apparent" until August 18, 2011 that "reality could not catch up" to their statements, Plaintiffs have essentially conceded their inability to plead falsity (much less knowledge of falsity).

That leaves Plaintiffs insisting that this Court must accept any theory they advance (pled or unpled), regardless of how far-fetched. Not so. Under the PSLRA, courts must dismiss complaints like this one whose fundamental premise is irrational and unsupported by well-pleaded facts. Plaintiffs contend that "[t]here is nothing 'irrational' in the allegations that Defendants misled investors by announcing a series of products that were not as developed as Defendants represented them to be, so as not to lose competitive advantage." *Id*. at 3. But this rationale makes no sense. Plaintiffs do not even identify the "competitive advantage" HP supposedly gained in the time period HP worked to develop webOS products. Nor do they allege that any Defendant had any financial or other motive for misleading investors. In short, having now conceded – as they must – that Defendants ***were*** committed to the TouchPad and webOS phones, Plaintiffs offer no plausible theory why Defendants would intentionally mislead the market for what would necessarily be a very short period by promising webOS PCs and printers by a date that they knew they could not meet. The more cogent, compelling and rational inference is that HP was working to develop all webOS products and was forced to re-evaluate and ultimately change its plans based on the market reaction to its initial webOS product launch. Thus, the Opposition fails to demonstrate any

claim against any Defendant.

Certain flaws in the allegations against each Individual Defendant particularly doom those claims. Plaintiffs' attempt to lump all Defendants together is improper. With respect to Ms. Lesjak, the Opposition gives the impression that she is not even a Defendant in this action – which is fitting, as she should not be. Plaintiffs do not quote a single allegedly misleading statement she made because her challenged statements are especially benign, forward-looking and ***do not mention PCs or printers at all, much less a specific time frame for release,*** i.e., Plaintiffs' core allegation. Instead, the Opposition highlights just three allegations pertaining to Ms. Lesjak: she is HP's CFO, Opp. at 42, 43, 47; she attended a single meeting in February or March 2011 at which webOS was discussed, *id*. at 31, 45; and she has stated that "we" monitor investments, *id*. at 44, 48. These allegations are patently insufficient to state a claim.

As to Mr. Apotheker, the Opposition takes his statements about the timing of the release of webOS on PCs and printers out of context or misstates them entirely. *Id*. at 23-24. Described accurately, the FAC alleges that Mr. Apotheker did not promise webOS-enabled PCs until ***2012,*** and made no representations about the timing of the release of webOS-enabled printers whatsoever. Ind. Br. at 13-14. Besides failing to show any false statement by Mr. Apotheker, much less a knowing one, Plaintiffs do not address the FAC's glaring omission of any possible motive, financial or otherwise, for Mr. Apotheker to intentionally harm the company he was charged with leading. The best the FAC can muster is that Mr. Apotheker was terminated after the webOS shut down, Opp. at 38, but this argument runs counter to clear case law holding that such allegations do not support an inference of scienter.

With respect to Mr. Bradley, the Opposition confirms Plaintiffs' inability to plead facts (as opposed to bald conclusions or speculation) to support a strong inference of scienter. Thus, despite the theory that Mr. Bradley predicted in

February 2011 that webOS products would be available by the end of that year, Plaintiffs point to no facts (from CWs or otherwise) showing that Mr. Bradley knew that his February 2011, March 2011 and July 2011 statements were false. Indeed, Plaintiffs' key argument as to the July statements is based on their "temporal proximity" to HP's eventual August 18, 2011 announcement. *Id*. at 28, 39-41. Yet that argument is both contrary to law and contradicted by the ***FAC itself***, which cites and explicitly relies on a news source stating that ***Mr. Bradley only learned of the decision to discontinue webOS on August 14, 2011***. ¶93, attached to the Declaration of Jennifer Bagosy ISO Omnibus Reply ("Bagosy Decl."), filed herewith, as Ex. 1; *see also* Supplemental RJN ISO Omnibus Reply ("Supp. RJN"), filed herewith.

II. PLAINTIFFS' FRAUD CLAIMS FAIL BECAUSE DEFENDANTS ONLY INDICATED AN INTENT TO PUT WEBOS ON PCS OR PRINTERS, NOT A PROMISE TO DO SO BY A SPECIFIC DATE

To determine whether Plaintiffs have adequately pled that Defendants made a series of materially false statements, the Court must first identify the challenged statements. Plaintiffs not only fail to plead adequately that the challenged statements were false when made for the reasons described below, but, as an initial matter, they fail to describe correctly the statements at issue. As Plaintiffs' Opposition reveals, their claims in fact hinge upon three (forward-looking) statements that they mischaracterize as commitments to market webOS PCs and printers by a date certain in 2011. *See, e.g.*, Opp. at 18, 20, 22-24, 40 (referring to ¶¶117, 139, 143):

1. Paragraph 117 (February 9, 2011 statement by Mr. Bradley): "We have a commitment to extend the WebOS footprint even further as the year progresses, taking WebOS to other connected devices, including printers, some form factors you haven't seen before . . . . "; "as we introduce that WebOS to our

millions of PC customers later this year . . . ."[2]

2. Paragraph 139 (March 14, 2011 statement by Mr. Bradley): "Next year, we'll migrate tens of millions of web connected printers into the ecosystem."

3. Paragraph 143 (March 14, 2011 statement by Mr. Apotheker): "There will be a beta version for web OS running on a browser on PCs available at the end of the year and you will see us putting web OS on the (inaudible) technology on PCs, on Windows PCs I should add, starting from that point onwards."

Plainly, none of these statements promised that webOS PCs or printers would be on the market by any specific date. Rather, the first statement referred generally to extending webOS to other devices "as the year progresses" and only mentioned "introduc[ing] that WebOS to our millions of PC customers" without specifying what form that introduction might take. The second statement referred to putting webOS on printers "[n]ext year," which would be 2012, ***not*** 2011 as Plaintiffs contend.[3] The third statement similarly referred only to a "beta version," i.e., a test version, running on PCs at the end of 2011 with HP "putting webOS" on PCs starting after that, i.e., at some point in ***2012***. Mr. Apotheker underscored this point again on June 2, 2011 when, in response to a specific question from an analyst, he gave 2012 – all twelve months of 2012 – as the date for releasing webOS on PCs. He said nothing on June 2 about printers, as Plaintiffs assert. Opp. at 40; ¶162.[4]

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[2] Plaintiffs refer to Mr. Apotheker's statement "in January 2011 that webOS for PCs would be available 'later' in 2011," Opp. at 24 n.10, but the FAC makes no reference to statements by Mr. Apotheker in January 2011. In addition, Plaintiffs argue that Mr. Bradley "announced HP's plans to extend webOS to PCs in January 2011," *e.g.*, Opp. at 20, but this statement was actually made in February 2011. ¶117.

[3] Notably, nothing Mr. Bradley said after March 2011 could even arguably relate to the timing for putting webOS on PCs and printers.

[4] Accordingly, even if the Court accepted Plaintiffs' flawed view that any statement in February or March 2011 provided a firm deadline, Mr. Apotheker's June 2011 statement updated the market and informed investors that the deadline would be 2012, ***not*** 2011.

The few statements that Plaintiffs attribute to Ms. Lesjak ***do not even mention PCs or printers, much less a time frame for their release***. ¶¶130-31, 153, 167-68. Thus, Defendants never even told, much less promised, the market that webOS would be available on PCs and printers in 2011.

While Plaintiffs suggest that analysts' reactions show that the challenged statements represented a commitment, Opp. at 8, the FAC itself in fact shows the opposite. One analyst report after the February 9, 2011 statement specifically noted that "HP did not provide a timeline for a PC version," ¶122, implicitly recognizing the general language Mr. Bradley used. The Court need not accept Plaintiffs' characterization of language as making specific promises where it obviously does not. *Gissin v. Endres*, 739 F. Supp. 2d 488, 506 n.102 (S.D.N.Y. 2010) (rejecting plaintiffs' characterization of defendants' statements because "[p]laintiffs' conclusory allegations cannot serve as a substitute for the facts, particularly when they are plainly contradicted by the record"). Accordingly, Defendants never made the specific promises that Plaintiffs now contend constitute the "core allegation" underlying their theory of liability. Opp. at 18 n.7.

III. PLAINTIFFS FAIL TO SHOW THAT DEFENDANTS' STATEMENTS WERE FALSE WHEN MADE

Even if Defendants' broad aspirational statements were somehow read to suggest a commitment to a specific time frame, claims based on those statements should still be dismissed. As demonstrated, Plaintiffs do not adequately plead facts showing that those – or any other – challenged statements were false when made.

A. Plaintiffs Must Allege Particularized Facts

Plaintiffs mischaracterize the relevant pleading standards, suggesting that satisfying the standards under Federal Rule of Civil Procedure 12(b)(6), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), is sufficient. Opp. at 4-5. In addition to alleging a plausible claim, however, Plaintiffs must meet both Federal Rule of Civil Procedure 9(b)'s

particularity requirement and the PSLRA's more "[e]xacting pleading requirements." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Thus, while Plaintiffs contend that they need not provide detailed factual allegations, this Court in *Pittleman v. Impac Mortgage Holdings, Inc.*, No. SACV 07-0970, 2009 WL 648983, at *2 (C.D. Cal. Mar. 9, 2009), *aff'd, Sharenow v. Impac Mortgage Holdings, Inc.*, 385 F. App'x 714 (9th Cir. 2010), as well as the Ninth Circuit and the Supreme Court, require pleading specific facts demonstrating falsity as well as specific facts showing a strong – not merely plausible – inference of scienter in securities fraud cases. HP Br. at 7, 25-26; *see also* 15 U.S.C. § 78u-4(b)(1).

Plaintiffs also contend that they may allege falsity collectively. Opp. at 3 ("Viewing those allegations ***collectively***, the Complaint amply establishes the falsity of Defendants' statements"), 20 ("Viewed ***collectively***, these allegations sufficiently plead" falsity) (emphasis on p. 20 in original). To the contrary, the law requires that the falsity of ***each*** challenged statement be established individually. Plaintiffs have apparently confused the standards for material false statements and scienter. While scienter allegations concerning a particular Defendant should be considered both individually and collectively, *Tellabs*, 551 U.S. at 326, no such rule applies to falsity, which requires specific facts showing why each challenged statement was false when made. 15 U.S.C. § 78u-4(b)(1)(B) (requiring plaintiff to "specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading"); *see also Beaver Cnty. Ret. Bd. v. LCA-Vision, Inc.*, No. 1:07-CV-750, 2009 WL 806714, at *9 n.7 (S.D. Ohio Mar. 25, 2009) (rejecting assertion that the court must consider all falsity allegations collectively; "[t]he *Tellabs* quote on which Plaintiff relies pertains to the scienter prong of the PSLRA requirements, ***not the misleading statements prong***"). Thus, Plaintiffs' "collective" approach to establishing falsity does not comport with the PSLRA's standards. Under the PSLRA, "[a] litany of alleged false statements,

unaccompanied by the pleading of specific facts indicating why those statements were false, does not meet this standard." *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1070 (9th Cir. 2008).

Just as falsity cannot be shown collectively, the Individual Defendants cannot be treated as a collective unit under the "group pleading" doctrine. Plaintiffs in fact concede this point, agreeing that group pleading "is of no import here" because "corporate statements are not being attributed to Individual Defendants that have not personally made" statements, Opp. at 37, thereby disavowing any effort to hold the Individual Defendants responsible for statements they did not make. Thus, each Individual Defendant's primary liability can only relate to the specific statements that he or she actually made, not statements made by others. *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2299 (2011) ("We conclude that JCM cannot be held liable because it did not make the statements in the prospectuses."). Plaintiffs fail to meet that standard. Ind. Br. at 2.

B. Plaintiffs Fail To Identify How Statements About The Ongoing webOS Development Process Were False When Made

Most of the facts upon which Plaintiffs rely in an attempt to establish the purported negative "truth" behind each of the allegedly false statements do not include the critical element of timing. Thus, even if the Court were to credit the alleged problems HP experienced with webOS development – which, for the reasons discussed in the Motions to Dismiss and herein, the Court should not do – Plaintiffs still fail to allege adequately that the supposed problems existed at the time each statement was made or that those problems made the forward-looking statement false when made. *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1086 (9th Cir. 2002), *abrogated in part on other grounds by S. Ferry LP, #2 v. Killinger*, 542 F.3d 776 (9th Cir. 2008) ("[A]lthough the complaint alleges that over the fifteen-month class period, [defendant] continually and deliberately misled investors by stating that its sales-cycle was 'holding steady at three to six months,'

much of the complaint fails to allege any facts to indicate why this statement would have been misleading at the several points at which it was alleged to have been made."); *In re Am. Apparel, Inc. S'holder Litig.*, No. CV 10-06352, 2012 WL 1131684, at *21 (C.D. Cal. Jan. 13, 2012); *Pittleman*, 2009 WL 648983, at *3.

When alleging falsity based on problems encountered in the process of product development, it is critical that Plaintiffs show that ***at the time each statement was made***, "the problems were so large and insurmountable that the statement was false." *In re NVE Corp. Sec. Litig.*, 551 F. Supp. 2d 871, 895 (D. Minn. 2007), *aff'd*, 527 F.3d 749 (8th Cir. 2008); *see also City of Roseville Emps. Ret. Sys. v. Nokia Corp.*, No. 10 CV 00967, 2011 WL 7158548, at *9 (S.D.N.Y. Sept. 6, 2011) (holding that "Plaintiff has alleged insufficient facts about the timing and significance of the alleged software problems to demonstrate that the omission rendered the statements false or misleading"); *Allison v. Brooktree Corp.*, 999 F. Supp. 1342, 1348 (S.D. Cal. 1998) (cited in Opp. at 10) (granting motion to dismiss explaining that vague statements of optimism were not actionable absent facts that the company "had encountered any insurmountable problems, or the problems were of such magnitude that Defendants knew the projected release dates to be unrealistic, or any other fact that would undermine the tentative and vague nature of these statements").[5]

Thus, it is not enough simply to argue, as Plaintiffs do here, that the HP teams working on webOS for PCs and printers were "small." Opp. at 2. Rather, putting aside their mischaracterization of statements, *see* § II, *supra*, Plaintiffs must

[5] Plaintiffs assert that "allegations of specific problems undermining a defendant's optimistic claims suffice to explain ***how*** the claims are false." Opp. at 5 n.3 citing *Fecht v. Price Co.*, 70 F.3d 1078, 1083 (9th Cir. 1995) (emphasis in original). *Fecht*, however, was decided pre-PSLRA, and later decisions have held that the existence of problems alone is insufficient to show that forward-looking statements were false when made. *See, e.g.*, *Ronconi v. Larkin*, 253 F.3d 423, 434 (9th Cir. 2001) ("Problems and difficulties are the daily work of business people. That they exist does not make a lie out of any of the alleged false statements.").

show that as of February 2011, whatever these teams were doing made it "insurmountable" that webOS could be "introduc[ed]" to PCs by the end of 2011. Similarly, Plaintiffs must show that as of March 2011, there were "insurmountable" problems with putting webOS on printers in 2012 or running a "beta version" on PCs by the end of 2011 – nine months away. Plaintiffs fail to do so. To the contrary, the allegations in the FAC suggest that HP was making progress in that arena.

As described below, neither CW1 nor CW2 is a reliable source for the FAC's averments about HP's efforts to develop webOS for printers and PCs. Even if they were, however, the essence of their allegations is that no written plan and only small development efforts existed when Mr. Bradley and Mr. Apotheker made the three challenged statements about putting webOS on PCs and printers. ¶¶70-72, 75-76. That is not enough to establish fraud. Significantly, neither CW1, CW2, nor any other source show how the allegation that no specific plan existed as of February or March 2011 meant the challenged statements were false when made. CW1 contends that it takes "at least a year from concept to delivery" of "a product that eventually could be sold." ¶70. Therefore, the February and March 2011 statements were entirely consistent with a development process that was in its early phases, but would be producing "beta versions" to "introduc[e]" webOS to PCs in nine to ten months, with a product to be sold coming later. Notably, in June 2011, Mr. Apotheker was unequivocal that webOS would not be available on PCs until sometime during 2012, possibly the twelfth month of 2012 – a time frame entirely consistent with CW1's assertions about the state of development when he left the Company in July 2011, ¶63, and with his assertions about how long development takes. *Mallen v. Alphatec Holdings, Inc.*, No. 10-cv-1673, 2012 WL 987314, at *13 (S.D. Cal. Mar. 22, 2012) (finding that plaintiffs failed to show a statement to be misleading where "even assuming [the company] was experiencing integration delays at the time, that fact is not inconsistent with [the company's statement]").

C. Plaintiffs Fail To Show That Any Problems With The TouchPad Were So Large And Insurmountable As To Render Statements About That Product False When Made

Plaintiffs appear to have abandoned their claims relating only to the TouchPad and focus their challenges on statements about HP's "ecosystem," specifically the timing of putting webOS on PCs and printers. Opp. at 24. Plaintiffs specifically concede that "[t]he Complaint does not allege, as Defendants assert, that HP was not committed to developing the TouchPad ***in isolation***." *Id*. at 24 (emphasis in original). This concession alone should result in dismissal of any claims relating to statements about the TouchPad.

Nevertheless, Plaintiffs argue that flaws in the TouchPad rendered certain challenged statements false. *Id.* at 25. These arguments should be rejected because, as discussed below,[6] they are based on unreliable CWs, and because the allegations about supposed problems with the TouchPad (even if credited as reliable) do not show falsity. For example, Plaintiffs never respond to Defendants' argument that the FAC lacks any facts showing what supposed bugs still existed at the time of the TouchPad's release, other than the alleged "Wi-Fi bug." *See, e.g., Silva v. U.S. Bancorp*, No. 5:10-cv-01854, 2011 WL 7096576, at *3 (C.D. Cal. Oct. 6, 2011) ("'It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.'"). Even as to the "Wi-Fi bug," Plaintiffs have no response to their failure to plead facts showing how or when it was addressed, HP. Br. at 15-17, nor, as discussed below, do Plaintiffs have any response to CW2's lack of personal

[6] Plaintiffs contend that CW1 is a reliable source as to alleged software bugs affecting the TouchPad, Opp. at 25-26, but CW1 did not provide any averments about any particular problems with the TouchPad, just the general assertion that the software was not ready because they did not have enough time or resources. ¶81.

knowledge as to any impact of the "Wi-Fi bug" on TouchPad sales. Nor do Plaintiffs provide any authority supporting their position that the mere release of a software update – a routine occurrence for such products – constitutes an acknowledgement of flaws or even set forth what supposed problems the software update addressed. Opp. at 26. Defendants never argued that the update was a "concession of flaws," *id.*; that language in the HP Brief described Plaintiffs' erroneous position. Ultimately, Plaintiffs' arguments on the TouchPad distill to the contention that the TouchPad was a flawed product rushed to market. *Id.* Such a contention depends entirely upon unsupported opinions from unreliable CWs, not specific facts showing falsity.

D. Plaintiffs Cannot Rely On The CWs To Show That Statements Were False When Made

Plaintiffs do not contest that courts reject unreliable CW statements and grant motions to dismiss when those statements lack a proper foundation. Nor do they dispute Defendants' argument that the CWs' allegations should be rejected to the extent they consist of the CWs' personal opinions. Plaintiffs thus implicitly acknowledge they must demonstrate falsity based on particularized facts of which the CWs have personal knowledge – facts that are entirely missing from the FAC.

Arguing that the CWs corroborate each other, Opp. at 29, does not save Plaintiffs' claims. A "shared opinion" is irrelevant where a plaintiff fails to plead the requisite particularity and personal knowledge. *In re Metawave Commc'ns Corp. Sec. Litig.*, 298 F. Supp. 2d 1056, 1070 (W.D. Wash. 2003). Likewise, the project roadmap CW1 mentions does not bolster the CWs' reliability. Documentary evidence only corroborates CW testimony when the documents "'provide an adequate basis for believing that the defendants' statements were false.'" *Zucco Partners v. Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009). The

roadmap is undated, the author is unidentified,[7] and the FAC does not plead who or even which group created the document.

Plaintiffs assert several arguments to meet the relevant standard, none of which is persuasive.

1. The CWs Lack Sufficient Personal Knowledge To Be Reliable Witnesses

Plaintiffs' contention that the CWs possess adequate personal knowledge, Opp. at 30-32, misconstrues the challenges raised by Defendants. The FAC does not establish that any of the four CWs are reliable. With respect to CW1, while the FAC alleges that CW1 had at least some personal knowledge of webOS and the TouchPad, it fails to aver that CW1 had the required personal knowledge of the ongoing status of the ***PC and printer projects***, which were handled by other departments and for which others apparently acted as liaisons. Plaintiffs offer no response. *Id*. at 30. The allegation that CW1 was the guardian of the code (which, incidentally, he only asserts the ***printer*** group did not possess, *compare* ¶¶70-71 *with* ¶72) does not demonstrate CW1's personal knowledge of the day-to-day status of projects in the PC or printer group. *Zucco*, 552 F.3d at 996 (confidential witness lacked personal knowledge of the company's accounting practices where he did not work in the finance department).

Plaintiffs contend that CW2 corroborates CW1, but CW2 also lacks personal knowledge to support his testimony. Now cornered, Plaintiffs suddenly speculate that CW2 "would have known of product development plans that were critical to sales and marketing strategies," Opp. at 31, but provide no support for this newly stated conjecture. *In re A-Power Energy Generation Sys. Ltd. Sec. Litig.*, No. MDL

[7] Although Plaintiffs contend Defendants engage in "implausible speculation" by assuming the roadmap is a Palm GBU document, Opp. at 21, they contradict themselves in another part of the Opposition when they state that the FAC alleges the roadmap "contained financial analytics and projections ***for each planned Palm GBU product***." *Id*. at 19.

11-2302, 2012 WL 1983341, at *12 n.16 (C.D. Cal. May 31, 2012) (court need not consider new facts in opposition). Nor do Plaintiffs rebut the fact that because CW2 did not join the Palm GBU department until late June 2011, ¶¶73, 76, his statements about prior events regarding webOS are ***all*** based on hearsay, not personal knowledge. Even after June 2011, Plaintiffs do not explain how CW2 had personal knowledge of anything beyond commercial accounts.

As to CW3, the Senior Vice President of Hardware Engineering who was "responsible for webOS ***hardware***," ¶82, Plaintiffs speculate he must also have had personal knowledge of the status of webOS ***software*** development. Opp. at 31. The FAC does not plead that CW3 had any responsibility for software development – let alone knowledge of its day-to-day status. Plaintiffs argue that CW3 reported to webOS "visionary" Mr. Rubinstein, who had responsibility for both hardware and software. *Id*. But the scope of Mr. Rubinstein's responsibilities, whatever they were, cannot establish the scope of CW3's personal knowledge. Plaintiffs also ask this Court to assume, *id*. at 31, without any supporting allegations in the FAC, that CW3 would have had access to, and availed himself of, information regarding not only software development, but marketing data as well. *Crosbie v. Endeavors Techs., Inc.*, No. SA CV 08-1345, 2009 WL 3464135, at *3 (C.D. Cal. Oct. 22, 2009) ("Nor should the court countenance 'new' facts alleged for the first time in opposing papers."). The assertion that CW3 has additional personal knowledge not mentioned in the FAC is an underlying fact that cannot be pled in Plaintiffs' Opposition. Lastly, Plaintiffs contend that CW4 corroborates CW3's testimony about a Sunday meeting, Opp. at 31-32, but gloss over the fact that CW3's description of this meeting lacks critical information (such as the month in which the meeting occurred, or whether anyone responded to Mr. Apotheker's deadlines) – information that CW4, who did ***not*** attend the meeting, cannot provide. Moreover, all Mr. Apotheker purportedly said at that meeting is that he would "shut it down" if "it" was not working by the end of the year, hardly an indication that the

schedule was not attainable.

Finally, Plaintiffs ask the Court to infer CW4's personal knowledge based on various allegations about different scattered events. For example, Plaintiffs point to the facts that CW4 attended Sunday meetings, reported to CW1 and interacted with Mr. Rubinstein. *Id*. at 32. But Plaintiffs fail to explain how these limited facts provide sufficient basis for CW4's sweeping pronouncements, such as what was important to Mr. Apotheker. Plaintiffs cannot save CW4 by contending that his statements are corroborated by others' allegations about software bugs or by statements by Mr. Apotheker about his involvement, *id*. at 32, because those statements add nothing to CW4's speculation.

2. Defendants Raised Obvious Flaws With Plaintiffs' Inferences Based On Facts In The FAC; They Have Not Raised Factual Challenges

Plaintiffs mistakenly contend that Defendants raise factual disputes in their Motions to Dismiss. *Id*. at 33. HP simply noted, based on the facts pled, that the CWs lacked personal knowledge about events that did not occur during the time that they worked in certain positions and therefore could not support arguments or inferences based on supposed events when they were not there. HP Br. at 19-22. Thus, for example, CW1 is not a reliable source for any events that occurred after he left HP in July 2011. Contrary to Plaintiffs' assertion, *Downey* does support Defendants' argument, Opp. at 34 n.14, because *Downey* expressly holds that "CW10 and CW20 have no basis to opine about Downey's underwriting or lending practices after they left the company." *In re Downey Sec. Litig*., No. CV 08-3261, 2009 WL 2767670, at *10 (C.D. Cal. Aug. 21, 2009). The fact that the CWs in *Downey* left before the start of the putative class period does not alter the holding that CWs cannot speak to post-departure events, even if they were at HP for part of the putative class period.

Similarly, it is undisputed that CW2 did not work for the Palm GBU until

June 2011 and that the roadmap was not prepared until spring 2011. Thus, until CW2 worked at the Palm GBU, he is not a reliable source for what happened there. The roadmap cannot be used to show that statements made before its creation were false. These are straightforward timing issues, not factual disputes.

Further, with respect to CW3, Plaintiffs' conclusory allegation that the "thing" to which Mr. Apotheker allegedly referred in February or March 2011 ("If this thing is not working by the end of the year I'm gonna shut it down," ¶82) related to webOS as a whole, and not just the TouchPad, Opp. at 33, makes no sense. The FAC states that "[a]t this meeting [where the statement was purportedly made], Apotheker imposed many deadlines leading to ***release of the TouchPad*** that CW3 viewed as plainly unattainable. According to CW3, Bradley and Rubinstein agreed to these deadlines in order to appease Apotheker." ¶82. As pled in the FAC, the statement was clearly made with respect to the TouchPad.[8] The fact that Plaintiffs then draw the unsupported inference that Mr. Apotheker was "[r]eferring to webOS" more generally is not even plausible. Thus, these issues go to the heart of the strength of the inferences that may be drawn based on the CWs' statements; they are not factual disputes. The Court should focus on what Defendants and the FAC said, not on Plaintiffs' mischaracterizations and unwarranted assumptions.

3. The CWs Improperly Rely On Hearsay

Plaintiffs do not dispute that their CWs report hearsay, which the Ninth Circuit has held is unreliable and insufficient under the PSLRA. *See, e.g.*, *Zucco*, 552 F.3d at 998 n.4. In response to the weight of authority against hearsay, Plaintiffs cite *In re Cadence Design Systems, Inc. Securities Litigation*, 692 F. Supp. 2d 1181 (N.D. Cal. 2010). In *Cadence,* however, the court noted that "[t]he credibility of

[8] The FAC references this statement again in paragraph 12, but this time paraphrases it, stating that "Apotheker decreed internally that he would 'shut down' the entire webOS program if it was not 'working out by the end of the year.'" ¶12. As is clear from the more specific paragraph 82, Mr. Apotheker was referring to the TouchPad alone.

CW12 is problematic," precisely because his statements were "most likely hearsay." *Id*. at 1188. As a result, the court did not simply accept the CW's testimony. Rather, the court held that the CW's allegations "should not be entirely discounted," but only because plaintiffs had submitted a declaration from the CW that persuaded the court that the CW "had access to reliable information about Cadence's activities." *Id*. at 1188-89. Plaintiffs offer no similar indicia of reliability here. *Luxpro Corp. v. Apple Inc.*, No. C 10-3058, 2011 WL 3566616, at *3 (N.D. Cal. Aug. 12, 2011), is also distinguishable because the court held there that hearsay allegations were sufficient only to support the plaintiff's non-securities claims, which were subject to the pleading standard of Federal Rule of Civil Procedure 8 and did not require heightened pleading.

In addition, Plaintiffs argue that the matters reported by the CWs should not be considered hearsay because they are "excited utterances." Opp. at 35-36. Neither CW1's statement that he observed others' reactions of "surprise and horr[or]," ¶64, nor CW2's statement that there was a "strong reaction" within his team, ¶75, are "excited utterance[s]" because no "utterance" was pled. Fed. R. Evid. 803(2) (an excited utterance is "[a] statement relating to a startling event or condition."). Indeed, the heart of the problem with these allegations is that the CWs fail to say what, exactly, their team members said (a "strong reaction" could mean anything, and "were surprised and horrified" could refer to facial expressions rather than statements). This is the reason courts reject CW allegations based on hearsay – not necessarily based on technical hearsay rules, but because such averments lack sufficient facts to be reliable. *Zucco*, 552 F.3d at 997-98 (rejecting confidential witness's hearsay testimony that "some employees were upset about their time being reassigned," and that officers "munged" financials); *Downey*, 2009 WL 2767670, at *10 (rejecting as hearsay confidential witness statements about employees, bragging). Thus, Plaintiffs' other evidentiary arguments, including that these are "present sense impressions," fail because Plaintiffs have not sufficiently

established the reliability of their witnesses.

E. Temporal Proximity By Itself Does Not Establish Falsity

Without documents or CWs to demonstrate falsity, Plaintiffs resort to the contention that the temporal proximity between certain challenged statements and the ultimate decision by HP to change course with respect to webOS shows the statements were false when made. Opp. at 28-29. Plaintiffs' reasoning lacks merit.

Factually, the argument fails because it ignores Plaintiffs' own assertion that the "core allegation" for their claim is the statements about the timing of putting webOS on PCs and printers. Those statements were made in February and March 2011, ***five to six months*** before the August 18, 2011 announcement. Plaintiffs refer to a statement by Mr. Bradley in July 2011, *id.* at 28 citing ¶177, but that statement says nothing about the timing for webOS on PCs and printers. It merely notes HP's "intention to enable all of our PC users to access their WebOS environment, their applications on their PCs." ¶177. There is no commitment to timing here. Plaintiffs' argument is also inconsistent with their own theory that the August 19 announcement was made only after HP supposedly realized that its development efforts "could not catch up" to the earlier optimistic statements. Opp. at 41 n.17.

Legally, Plaintiffs acknowledge – as they must – that temporal proximity without more is insufficient to plead falsity. Opp. at 28-29. Yet that is all they offer. Based on HP's supposed "abrupt reversal, viewed collectively with the Complaint's other allegations," as well as a supposed "implied acknowledgement" in the August 18, 2011 press release, which only mentioned the TouchPad and webOS phones, Plaintiffs seek to draw an "inference" that "there were never any webOS PCs or printers in meaningful development." *Id*. at 28-29. But the facts on which Plaintiffs base their "inference," *id.*, are insufficient to satisfy the legal standard. *See, e.g.*, *In re VISX, Inc. Sec. Litig.*, Nos. C-00-0649, C-00-0815, 2001 WL 210481 at *10 (N.D. Cal. Feb. 27, 2001), *aff'd*, 298 F.3d 893 (9th Cir. 2002) (rejecting plaintiffs' argument that temporal proximity supported falsity where they

pled no facts showing company had made decision before it was announced). Arguments based on the supposed "abrupt reversal" constitute nothing more than impermissible fraud by hindsight. As described above, the FAC lacks particularized facts showing that no "meaningful development" had occurred on webOS for PCs and printers. Moreover, even if no "meaningful development" had occurred as of July 2011, that would not render statements made in February or March 2011 false when made. Nor would it show Mr. Bradley's July 2011 statements were false when made, since he said nothing about timing. Mr. Bradley simply noted HP's intention to extend webOS to PCs, and Plaintiffs have conceded that such development was occurring. The omission of PCs and printers from the August 18, 2011 press release demonstrates nothing about their development; the more plausible and rational inference to be drawn is that HP only discussed products that were on the market and ***not*** that no other products were in development.

F. Generalized Positive Statements About webOS Are Inactionable Puffery

Plaintiffs also challenge Defendants' position that generalized positive statements about webOS and the TouchPad are inactionable puffery. Opp. at 6-11. Their arguments should be rejected. As a threshold matter, the Opposition does not dispute that certain statements made on March 14, 2011, May 17, 2011, July 6, 2011 and July 11, 2011 are inactionable statements of optimism and puffery. *Id*. at 7 (failing to respond to Defendants' arguments regarding ¶¶146, 153, 171, 173-74). Thus, this Court must dismiss all claims based on those statements. *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111 (9th Cir. 2010).

Nor does the Opposition challenge that the statements Defendants identify as puffery are, on their face, "vague, generalized assertions of corporate optimism." *In re Impac Mortg. Holdings, Inc. Sec. Litig.*, 554 F. Supp. 2d 1083, 1096 (C.D. Cal. 2008); *see also* HP Br. at 8-10. Indeed, as to Ms. Lesjak, the Opposition does

not even quote any of her challenged statements in its puffery section, presumably because her cursory remarks are quintessentially the kinds of soft statements that are not actionable. Likewise, certain of the statements Plaintiffs now point to as promising webOS PCs and printers in 2011 (discussed in § II, *supra*) are so broadly worded, so general, and so clearly aspirational, as to constitute non-actionable puffery. *Compare, e.g.*, ¶117 ("[w]e have a commitment to extend the WebOS footprint even further as the year progresses…") *with Am. Apparel,* 2012 WL 1131684, at *20 (holding that statements like "committed to" are not actionable because they "indicate[] that the company was articulating goals it was trying to meet, not making factual statements about [] current status."). No reasonable investor would have viewed general aspirational statements about the timing for putting webOS on PCs and printers as definite promises.

Instead, Plaintiffs identify two types of generalized positive statements that they insist are actionable: (1) "statements regarding webOS's 'future and opportunity' and the purported webOS 'ecosystem'"; and (2) the positive statements "we will not release a product that isn't perfect," ¶158, and "webOS is ready for prime time," ¶161. Opp. at 7, 10. Plaintiffs contend that facts immediately preceding or following the generalized statements can somehow make them actionable, *id*. at 7, and that internal reports about problems make these statements actionable. *Id.* at 8. Neither assertion withstands scrutiny.

1. No Facts Preceding Or Following The Defendants' Generalized Optimistic Statements Render Them Actionable

As an initial matter, Plaintiffs rely on outdated and/or distinguishable case law. They lead with an unpublished, non-citable, pre-PSLRA opinion issued twenty-one years ago. Opp. at 6 citing *Beloit Corp. v. Emett & Chandler Cos., Inc*.,

No. 90-55154, 1991 WL 153459 (9th Cir. Aug. 14, 1991).[9] Plaintiffs then cite *South Ferry LP, # 2 v. Killinger*, 399 F. Supp. 2d 1121, 1130 (W.D. Wash. 2005), *vacated in part on other grounds*, 542 F.3d 776 (9th Cir. 2008), for the proposition that the statements are not actionable if they are "either immediately preceded or followed by very specific statements of fact that supposedly justify or supply a foundation for the optimism." Opp. at 6. In *South Ferry*, however, the company's statement about integration was accompanied by specific and detailed historical facts that "highlighted the importance of [defendant's] ability to integrate its acquisitions." *S. Ferry*, 399 F. Supp. 2d at 1130. Specifically, the court found that a general positive statement was not puffery because the very next sentence stated that there were "currently . . . nine different loan origination systems in our mainstream home lending channel." *Id*.

Notwithstanding Plaintiffs' attempted characterization, Opp. at 7-8 citing ¶¶117, 130, 139, 143, the statements at issue here are not historical facts, but rather announcements about products HP planned to introduce that were not yet on the market and alleged expressions of optimism regarding the timing of development for those products. For example, Plaintiffs suggest that Mr. Apotheker's statements in paragraph 143 – that "the devices we have been able to put on display on February 9 have in themselves a certain set of characteristics that make them unique" and that "[t]here is interconnectivity, the fact that they are seamless, they connect seamlessly to each other" – somehow support their claims regarding PCs and printers. Opp. at 7-8. But these statements quite clearly reference the "devices . . . put on display on February 9," which were the TouchPad and other webOS portable devices. The statements have nothing to do with printers and PCs.

Particularly baseless is the argument as to Ms. Lesjak's statement.

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[9] Pursuant to Ninth Circuit Rule 36-3, such unpublished opinions issued before January 1, 2007 may not be cited except in limited circumstances involving, for example, claim preclusion, double jeopardy or requests to publish an opinion.

Ms. Lesjak generally referenced "other devices" or "device solutions" without stating when application of webOS to other devices would occur or what the specific devices might be. Ind. Br. at 34-35.[10] Her reference to the TouchPad announcement and the fact that HP was in the process of working with developers hardly transforms into fraud her aspirational statement that "***over time***" webOS "***will redefine the user experience.***" Contrary to Plaintiffs' arguments, Opp. at 7, and in contrast to the "very specific statements of fact" in *South Ferry* – which, in context, seemed to warrant future success, 399 F. Supp. 2d at 1130 – Ms. Lesjak's statements highlighted the new and developing nature of the webOS venture.

These statements do not describe HP's historical experience in a particular area, and the Court should reject Plaintiffs' efforts to characterize examples of products HP intended to roll out in the future as part of its webOS ecosystem as a promise to deliver webOS enabled PCs and printers or any other product. Plaintiffs have pled no specific facts concerning the webOS "ecosystem," the hopes for the TouchPad, or the timing of webOS PCs and printers that would supply a foundation for treating the statements about timing as anything other than puffery.

Even assuming that these statements could be considered "historical facts," they do not immediately precede or follow the generalized statements Plaintiffs challenge and are often taken out of context. Opp. at 8. Indeed, in some instances Plaintiffs rely on alleged statements of "historical facts" that Defendants actually made months apart from the statements in question. *Compare, e.g.*, ¶117 (Plaintiffs' purported statement of historical fact made on February 9, 2011) *with* ¶177 (generalized positive statement made on July 20, 2011). Even when the supposed statement of "historical fact" was at least made on the same day as the generalized positive statement, it often did not immediately precede or follow the statement and may not have even been made by the same individual. *Compare*

[10] Plaintiffs' failure to address these arguments concedes the weakness of their claims against Ms. Lesjak. *See, e.g.*, *Metawave*, 298 F. Supp. 2d at 1090.

¶128 (statement by Mr. Apotheker in a February 22 analyst call) *with* ¶130 (statement of alleged "historical fact" from Ms. Lesjak, which appears later in the call). Accordingly, such statements are not actionable under *South Ferry*, even if its reasoning applied.

2. No Facts Show That Development Problems Contradicted The Challenged Generalized Positive Statements

The type of facts upon which Plaintiffs rely to show development problems relate solely to the TouchPad, Opp. at 10, and thus do not create liability as to optimistic statements about webOS overall. Even as to the TouchPad alone, the facts relate to a few development delays and opinions by CWs about flaws with the product. Opp. at 10-11. As noted in § III(D), *supra*, the CWs' personal views are not an adequate basis for imposing liability, and the CWs lack personal knowledge, reliability and requisite facts for their criticisms of the TouchPad.

Moreover, for the reasons set forth above and in the Motions to Dismiss, the alleged issues with the TouchPad do not show "insurmountable problems" with the product at the time the positive statements were made. The *Wozniak* court rejected a claim that puffery was actionable because of CW allegations showing, *inter alia*, negative feedback about an unreleased product, and an assertion that a CW "personally informed [the CEO] that [the product] could not be launched" on the timetable projected by the company – allegations very similar to the ones relied upon by Plaintiffs here. *Wozniak v. Align Tech., Inc*., No. C-09-3671, 2012 WL 368366, at *5-6 (N.D. Cal. Feb. 3, 2012). Indeed, if the type of vague problems described by Plaintiffs were sufficient to create liability as to products under development, it would have a chilling impact on aspirational comments by all companies. *In re Siebel Sys., Inc. Sec. Litig.*, No. C 04-0983, 2005 WL 3555718, at *4 (N.D. Cal. Dec. 28, 2005), *aff'd sub nom*, *Wollrab v. Siebel Sys., Inc*., 261 F. App'x 60 (9th Cir. 2007) ("That a new program has kinks does not make a positive statement about the program false. If that were the case, the federal securities laws

would prevent software companies from making any positive statements about new software.").

Mr. Apotheker's statements, for example, that "we will not release a product that isn't perfect," ¶106, and "webOS is ready for prime time," ¶161, are ***precisely*** the type of puffery that investors properly take with a grain of salt. It is simply not plausible to assert that when a CEO says a product will be "perfect," investors believe he literally means without flaw of any kind. To that end, as explained in the moving papers, courts have rejected securities fraud claims based on strikingly similar language. Ind. Br. at 7-8.

Plaintiffs' citation of *In re Apple Computer Securities Litigation*, 886 F.2d 1109 (9th Cir. 1989), for the proposition that statements of optimism about a forthcoming product can be actionable if the complaint identifies problems in development of the product is likewise inapposite. Opp. at 9-10. *Apple* says nothing about puffery, nor does it even provide any guidance about what must be pled to survive a motion to dismiss under the PSLRA. Rather, *Apple* was decided on a summary judgment motion years before the passage of the PSLRA, which substantially raised the pleading bar. *Pittleman*, 2009 WL 648983, at *2. To the extent *Apple*'s analysis of the evidence on summary judgment has ***any*** relevance to the arguments about puffery in this case, it supports Defendants' position that positive statements about a product in development are only actionable if facts demonstrate that "significant" problems affecting the product and its development timeline existed at the time of the positive statements. *Apple*, 886 F.2d at 1115. Indeed, in another case on which Plaintiffs rely, *Allison*, cited in Opp. at 10, the court granted the motion to dismiss because vague statements of optimism were not actionable without facts showing that the company "had encountered any insurmountable problems, or the problems were of such magnitude that Defendants knew the projected release dates to be unrealistic, or any other fact that would undermine the tentative and vague nature of these statements." 999 F. Supp. at

1348. As noted, Plaintiffs fail to make such a showing.

IV. THE CHALLENGED STATEMENTS ARE NOT ACTIONABLE BECAUSE THEY ARE FORWARD-LOOKING AND PLAINTIFFS DO NOT PLEAD THE REQUIRED SCIENTER, WHICH IS ACTUAL KNOWLEDGE OF FALSITY

Even if Defendants had promised to put webOS on PCs and printers in 2011 – which they did not – and even if Plaintiffs adequately alleged facts showing any such promise was false when made – which they do not – the FAC should still be dismissed because Plaintiffs do not adequately allege that any such statement was ***knowingly*** false.

Under the PSLRA, for ***each*** forward-looking statement that Plaintiffs challenge – regardless of whether the statement is identified as forward-looking or accompanied by meaningful cautionary language – Plaintiffs must plead particularized facts showing Defendants had ***actual knowledge*** that the statement was false when made. *Cutera*, 610 F.3d at 1112-13. Plaintiffs do not dispute that this is the correct legal standard. Instead, they seek to avoid its impact.

A. Plaintiffs' Claims Are Based On Forward-Looking Statements

Plaintiffs argue that certain challenged statements are not forward-looking because they purportedly convey information about the present. Opp. at 11-12. As an initial matter, such an argument cannot apply to the statements about the timing for putting webOS on PCs and printers. Those comments unquestionably relate to future events. Given that Plaintiffs portray those statements as their "core allegation," forward-looking statements plainly are at issue in this case.

Plaintiffs' contention that the other statements are not forward-looking is meritless because the statements' truth or falsity can only be determined at some time ***after*** the statements were made. Indeed, present-tense, or even historical, statements can qualify as forward-looking "as long as the truth or falsity of the statement cannot be discerned until some point in time after the statement is made."

In re Splash Tech. Holdings, Inc. Sec. Litig., 160 F. Supp. 2d 1059, 1067 (N.D. Cal. 2001); *see also In re LeapFrog Enters., Inc. Sec. Litig.*, 527 F. Supp. 2d 1033, 1046 (N.D. Cal. 2007) (observing that historical statements can qualify as forward-looking if they are "presented as factors underlying a projection or economic forecast").

Thus, although Plaintiffs attack various aspirational statements of commitment – such as "[w]e're committed to helping build this ecosystem, from small to big, from local to global," ¶117; "HP is committed and continues to be committed to develop the full potential of webOS in the marketplace. . . . We're investing in the build out of this ecosystem, from small to big," ¶139; and "[d]evelopment teams across HP are working to bring webOS and the webOS experience to the Windows PCs," *id.*; as well as statements "regarding 'HP's intent to . . . create one [webOS] ecosystem,'" Opp. at 12 – those statements qualify as forward-looking regardless of their use of present-tense terms. *In re Dot Hill Sys. Corp. Sec. Litig.*, No. 06-CV-228, 2009 WL 734296, at *13 (S.D. Cal. Mar. 18, 2009) (finding to be forward-looking a company's statements concerning its commitment and plans to make its business relationship with another company successful); *In re Connetics Corp. Sec. Litig.*, 542 F. Supp. 2d 996, 1007 (N.D. Cal. 2008) (finding to be forward-looking statement that the company is "'preparing our commercial operations for the introduction' of Velac"); *In re Discovery Labs. Sec. Litig.*, No. 06-1820, 2006 WL 3227767, at *4, *7, *16 (E.D. Pa. Nov. 1, 2006) (finding to be forward-looking statements that "[o]ur organization ***is committed*** to the anticipated commercial launch of our first precision-engineered surfactant product in the first quarter of 2006" and the company "***is focusing*** on preparing for the commercialization of Surfaxin . . . if approved"); *In re Lockheed Martin Corp. Sec. Litig.*, 272 F. Supp. 2d 944, 949 (C.D. Cal. 2003) ("[P]redictions of future events [do not] become actionable merely because they happen to have some basis in present facts."); *see also In re Infonet Servs. Corp. Sec. Litig.*, 310 F. Supp. 2d

1080, 1090-91 (C.D. Cal. 2003). Plaintiffs' "purely grammatical argument to the contrary . . . is unpersuasive." *Harris v. Ivax Corp.*, 182 F.3d 799, 805 (11th Cir. 1999). Nor can there be any doubt that these statements constitute "plans and objectives of management for future operations," which qualify for safe harbor protection. 15 U.S.C. § 78u-5(i)(1)(B).

Plaintiffs' reliance on *America West* is unavailing. Opp. at 12. There, the court found that alleged misstatements were not forward-looking because they concerned the "present effects" of a settlement on the company. *No. 84 Emp'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 936-37 (9th Cir. 2003) ("Each is a disclosure of the fine imposed by the settlement agreement for past violations of FAA regulations and a description of the present effects of their imposition on the company."). By contrast, the statements at issue here concerning "HP's intent to . . . create one [webOS] ecosystem" that would result in a "huge market," *see, e.g.*, ¶¶139, 143, 147, 153, 157, 161-63, 168, 173-74, 177, refer to HP's plans and hoped-for future performance, ***not*** any present effects on the Company. Such statements fall squarely within the boundaries contemplated by the PSLRA's safe harbor. *See, e.g.*, *Wozniak*, 2012 WL 368366, at *7 (finding statements concerning the company's product development goals, including "'extending the GP-focused ClinAdvisor product features and functionality,'" to be forward-looking); *In re Tibco Software, Inc.*, No. C 05-2146, 2006 WL 1469654, at *26 (N.D. Cal. May 25, 2006) (finding the statement that the company's opportunity to "bring Staffware to North America was 'huge'" was forward-looking).

B. Plaintiffs Fail To Plead Actual Knowledge, Which Is The Requisite Scienter

The FAC should be dismissed because it fails adequately to allege actual

knowledge of falsity.[11] None of the arguments offered in the Opposition saves Plaintiffs' claims. Indeed, Plaintiffs acknowledge that Defendants lacked actual knowledge of falsity when they contend that "[w]hen it became apparent that reality could not catch up to their false pronouncements, Defendants were forced to disclose the truth." Opp. at 41 n. 17. If the "reality" was not "apparent" until the "truth" was disclosed on August 18, 2011, then the prior statements were not made with actual knowledge of falsity.

Even without this concession, Plaintiffs' position still fails. First, Plaintiffs' reliance on their CWs to demonstrate scienter, Opp. at 38-39, ignores the fundamental problem that, even crediting everything the CWs allege, ***not one*** of them provides facts showing that ***any*** Individual Defendant – executives with oversight responsibility – was told that webOS problems were insurmountable, that TouchPad problems could not be overcome, or that webOS would not be available on PCs or printers in a timely fashion. For example, although the Opposition suggests that this Court can somehow infer scienter from CW1's allegations that he met with Mr. Bradley "twice a day," leading up to the February 9 event, Opp. at 38, 44, Plaintiffs never point to specific allegations in the FAC that demonstrate that Mr. Bradley ever said or did anything at those meetings evincing a belief that his statements were false at the time they were made. Nor does CW1 identify anything Mr. Bradley was supposedly told at these meetings that rendered his statements false when made. Rather, CW1 merely suggests that developers had encountered technical "bugs" with the TouchPad and webOS software. *Id.* at 25-26, 32. Even if true, the existence of such "bugs" in February is hardly inconsistent with a belief

[11] Although Plaintiffs mention the recklessness standard for scienter in a few places in their Opposition, Opp. at 3, 37, 38, 41 n.17, 48, it is always noted simply as an alternative to knowing conduct, and Plaintiffs never attempt to demonstrate how the facts on which they rely for scienter could show recklessness if they did not show actual knowledge. To the extent Plaintiffs are contending recklessness applies, their argument fails for the same reasons they do not show actual knowledge.

that HP could introduce webOS-based PCs by the end of 2011 or ultimately succeed in its long-term strategy. *Siebel*, 2005 WL 3555718, at *4 (plaintiffs failed to "allege any specific facts that give rise to a strong inference that the defendants . . . knew there were problems of such magnitude that it would make their positive statements false"); *NVE Corp.*, 551 F. Supp. 2d at 884 ("Knowledge that there were some obstacles to development that SMS was working to resolve or that engineers experienced frustration is not sufficient to show knowledge of falsity."). Plaintiffs have no cogent response to this and other arguments noting the deficiencies in the CW allegations. Therefore, because the CW statements in the FAC fail to demonstrate that Defendants actually knew their statements to be false at the time they were made, the CW allegations do not add to an inference of scienter. *Zucco*, 552 F.3d at 1000-01.

Second, Plaintiffs attempt to show actual knowledge as to undefined "late – class period" statements merely based on temporal arguments. Opp. at 39-40. Because this argument applies only to the "late-class period" statements, it is irrelevant to the February and March 2011 statements about timing for putting webOS on PCs and printers. Moreover, even as to "late-class period" statements (whatever that means), temporal proximity alone is not enough. *Ronconi*, 253 F.3d at 437 (temporal proximity of the allegedly fraudulent statement or omission to the later disclosure, without more, is insufficient to comply with the PSLRA); *see also Yourish v. Cal. Amplifier*, 191 F.3d 983, 997 (9th Cir. 1999) ("We therefore conclude that because the complaint's remaining allegations do not comport with the requirements of Rule 9(b), the temporal proximity of the statements [] and the August 8th disclosure, in and of itself, is insufficient."); *In re Foundry Networks, Inc. Sec. Litig.*, No. C 00-4823, 2003 WL 22077729, at *13 (N.D. Cal. Aug. 29, 2003) (even assuming two-month separation of events is "proximate," such proximity can only be used to "bolster" the complaint; proximity alone "is not sufficient to satisfy the requirements of the PSLRA"). Moreover, the FAC itself

completely refutes Plaintiffs' temporal proximity argument as to Mr. Bradley when it cites to and explicitly relies upon an article stating that Mr. Bradley ***did not learn of the decision to discontinue webOS until August 14, 2011 – long after his last challenged statement.*** ¶93; Bagosy Decl. Ex. 1; Supp. RJN. The article demonstrates that any inference to be drawn based on temporal proximity is unwarranted and far less compelling than the competing inference that Mr. Bradley did not know the statement was false when made.

Third, Plaintiffs argue that HP's costs related to the shutdown of webOS support a strong inference of scienter. Opp. at 41-42. In support, Plaintiffs cite to decisions where courts inferred scienter based on the magnitude of a restatement of past financials, not a situation (like this one) in which the costs resulted from a company's later discontinuation of a product or other unexpected business expenses. These two factual scenarios are not comparable for purposes of inferring a strong inference of scienter. The restatement cases on which Plaintiffs rely presume that the costs that were not disclosed initially and resulted in the financial restatement must have existed at some earlier time. *Id*. The same presumption does not apply where a decision to discontinue a line of business causes losses. Further, the opinions cited by Plaintiffs all note that an announced financial restatement, in combination with allegations of insider trading or other claims of motive, was sufficient to infer scienter. *Id*. Here, Plaintiffs fail to identify a motive with respect to any Defendant that would support a strong inference of scienter based solely on the significant costs HP incurred when it decided to forego webOS development. It simply cannot be the case that later losses suffered from a failed business decision (no matter how large) can suffice to establish that Defendants knew their statements about that business were false when made.

Fourth, lacking any other basis for scienter, Plaintiffs argue that the Defendants must have known about problems with webOS based on the core operations inference. Opp. at 42-45. This argument fails because, as this Court

recently recognized, attempts to infer scienter based on the core operations inference must be "'made in conjunction with detailed and specific allegations about management's exposure to [such] information.'" *Morris v. Smith Micro Software*, No. SACV 11-976 AG (ANx), slip op. at 10 (C.D. Cal. May 21, 2012), attached to Bagosy Decl. as Ex. 2; *see also Maiman v. Talbott*, No. SACV 09-0012, 2010 U.S. Dist. LEXIS 142712, at *16-17 (C.D. Cal. Aug. 9, 2010) (core operations inference available only where facts about management's role and the importance of the information were pled "in conjunction with ***detailed and specific allegations about management's exposure to factual information*** within the company."). In *Morris*, this Court rejected an attempt to infer scienter because the individual defendants played an active role in running the company and the information allegedly misrepresented was "'crucial to [the company's] operations and financial condition.'" *Morris,* slip op. at 10. Where plaintiffs did not explain how the facts they alleged would show knowledge of the problems or plead with particularity any discussions, such as who conducted them or what was disclosed, this Court declined to infer scienter, finding that the inferences sought by plaintiffs were "a bridge too far." *Id.*

The same analysis should apply here. As noted, the FAC lacks facts that would show what each Individual Defendant supposedly knew about problems with webOS. *Berson v. Applied Signal Technology, Inc.*, 527 F.3d 982 (9th Cir. 2008), on which Plaintiffs rely, Opp. at 43, is inapposite due to the lack of particularized facts. In *South Ferry*, *S. Ferry*, 542 F.3d at 785, n.3 (9th Cir. 2008).the Ninth Circuit distinguished *Berson* as one of the "exceedingly rare" instances where the core operations inference applied, because the stop work orders from the company's largest customer would have been obvious to the individuals running the day to day operations. The court noted that "[t]he first stop work order 'halted between $10 and $15 million of work on the company's largest contract with one of its most important customers,' and the second halted $8 million of work," curtailing

the source of 80% of the company's revenues. *Id.* There are no similar allegations here. *Plumbers Union Local No. 12 Pension Fund v. Ambassadors Group*, 717 F. Supp. 2d 1170 (E.D. Wash. 2010) is also distinguishable because it involved a small company where management had to be aware of the loss of a list that accounted for 45% of its marketing leads.

Additionally, Plaintiffs' acknowledgement that "HP is among the world's largest information technology companies, with operations in more than 170 countries" ¶34, that "PSG was the largest of HP's business segments by revenue, generating nearly $40 billion annually," ¶3, and that the webOS GBU was but one division of many within the PSG business unit, ¶45, seriously undermines Plaintiffs' core operations theory. These allegations of PSG's sheer size would tend to suggest that Defendants would be unlikely to know the details of webOS development. Moreover, as to Mr. Bradley, the core operations inference is completely undercut by Plaintiffs' reliance on an August 19, 2011 news article stating that Mr. Bradley did not learn of the plans to discontinue webOS until a few days prior to the August 18, 2011 announcement. ¶93.

Fifth, Plaintiffs briefly assert that Mr. Apotheker's termination on September 22, 2011, more than a month after HP announced its decision to discontinue webOS, supports a strong inference of scienter. Opp. at 45. Where, however, "there is no evidence that [a] defendant['s] termination was based on fraud," a termination is "not in and of [itself] evidence of scienter. Most major stock losses are often accompanied by management departures, and it would be unwise for courts to penalize directors for these decisions." *In re Cornerstone Propane Partners, L.P., Sec. Litig.,* 355 F. Supp. 2d 1069, 1093 (N.D. Cal. 2005); *see also In re Immersion Corp. Sec. Litig.*, No. C 09-4073, 2011 WL 6303389, at *8 (N.D. Cal. Dec. 16, 2011). Indeed, those cases cited by Plaintiffs to support an inference of scienter based on senior executives leaving included allegations suggesting that the departures were "highly suspicious" or were coupled with other

highly suspicious facts.[12] Contrary to Plaintiffs' cited decisions, the FAC here lacks similar allegations showing that Mr. Apotheker's termination was somehow related to alleged fraudulent conduct, and thus his termination alone cannot support a strong inference of scienter.

Lastly, Plaintiffs mischaracterize Defendants' position as one based solely on the introduction of the iPad 2 in an attempt to avoid the conclusion that the FAC states only a claim for fraud by hindsight. Opp. at 45-46. This distortion does not change the fundamental nature of Plaintiffs' allegations: namely, that because HP's webOS devices did not succeed, Defendants' earlier optimistic statements about those devices and webOS in general must have been knowingly false. This is "a classic example of pleading fraud by hindsight – a type of pleading that the [PSLRA] was specifically enacted to eliminate." *In re Silicon Storage Tech., Inc.*, No. C 05-0295, 2006 WL 648683, at *7 (N.D. Cal. Mar. 10, 2006), . Thus, Plaintiffs' own allegations, not Defendants' reference to the iPad 2 release, provide the basis for the fraud by hindsight "defense." Opp. at 45-46.

Accordingly, because Plaintiffs do not plead facts showing actual knowledge of falsity, the FAC should be dismissed.

[12] *See, e.g.*, *Middlesex Ret. Sys. v. Quest Software, Inc.*, No. CV 065-6863, 2008 WL 7084629, at *9 (C.D. Cal. July 10, 2008) (company's former CFO refused to cooperate with a Special Committee investigation into the same events that formed the basis of the complaint); *In re Scottish Re Grp. Sec. Litig.*, 524 F. Supp. 2d 370, 394 n.176 (S.D.N.Y. 2007) (noting additional highly suspicious and unusual facts, including the resignations of executives that "although not sufficient in and of themselves" added to a finding of scienter); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1273-74 (N.D. Cal. 2000) (company announced that executives were dismissed "for cause" and were criticized by the new chairman for participation in "improprieties" and that company executives publicly linked these firings to the alleged underlying fraud).

V. THE COMPETING INFERENCE THAT DEFENDANTS BELIEVED IN WEBOS AND WORKED TO DEVELOP IT BUT MADE A BUSINESS DECISION BASED ON MARKET FORCES IS MORE "COGENT AND COMPELLING" THAN PLAINTIFFS' IMPLAUSIBLE THEORY

The Supreme Court has instructed that "to determine whether a complaint's scienter allegations can survive threshold inspection for sufficiency, a court . . . must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff . . . but also competing inferences rationally drawn from the facts alleged." *Tellabs,* 551 U.S. at 314. Thus, Plaintiffs are wrong to insist that this Court should not evaluate the rationality of their theory of liability. Opp. at 3, 41 n.17. The Supreme Court requires just that.

Plaintiffs also contend that this Court must draw only inferences in favor of their position. To the contrary, under *Tellabs*, in assessing scienter "'the court must consider all reasonable inferences to be drawn from the allegations, ***including inferences unfavorable to the plaintiffs***.'" *Metzler*, 540 F.3d at 1061; *see also Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002) ("To accept plaintiffs' argument that the court is required to consider only inferences favorable to their position would be to eviscerate the PSLRA's strong inference requirement by allowing plaintiffs to plead in a vacuum.").

Here, Plaintiffs' underlying theory is irrational. Having conceded that HP was committed at least to the TouchPad, which was released to the market, Opp. at 24, they now argue that HP knowingly misled the market about the timing of putting webOS on PCs and printers in order to gain a competitive advantage. That theory makes no sense. Plaintiffs fail to identify any competitive advantage that could be gained, and any such advantage would at most have lasted but a few months until HP failed to meet the announced timetable. *In re Citrix Sys., Inc. Sec. Litig.*, No. 00-6796, 2001 U.S. Dist. LEXIS 25351, at *12 (S.D. Fla. Sept. 28,

2001) ("[A]llegations of misleading statements or omissions that lead to temporary inflation of stock price that run contrary to a defendant's 'informed economic self-interest,' have been held insufficient for scienter, even prior to the PSLRA."); *In re CDnow, Inc. Sec. Litig.*, 138 F. Supp. 2d 624, 642-43 (E.D. Pa. 2001) (rejecting as implausible plaintiff's scienter theory that defendants concealed the company's true financial condition in order to artificially inflate stock prices over a class period of less than two months; "a plaintiff must show concrete benefits that could be realized as a result of a defendant's deceptive practices"). "Absent some significant factual averment to the contrary, it is not reasonable to think that the defendants intentionally launched [the TouchPad] with what they recognized was a flawed [ecosystem], as if they were more interested in fooling the stock market in the short term than succeeding in the product market in the long run." *In re Praecis Pharm., Inc. Sec. Litig.*, No. 04-12581, 2007 WL 951695, at *12 (D. Mass. Mar. 28, 2007).

The only reasonable inference here is that HP had high hopes for the TouchPad until it learned post-release that it could not compete with the iPad 2. Only at that point did the Company decide to forego webOS and webOS products rather than continue to take on losses.

VI. FURTHER ARGUMENTS DEMONSTRATE THAT PLAINTIFFS FAIL ADEQUATELY TO PLEAD SCIENTER AS TO ANY OF THE INDIVIDUAL DEFENDANTS

Plaintiffs' attempt to satisfy their burden to plead specific facts to create a strong inference of scienter against all the Individual Defendants fails for the reasons set forth above. But, as described below, certain flaws as to each Individual Defendant warrant particular emphasis.

A. There Is No Strong Inference Of Scienter As To Ms. Lesjak

Plaintiffs' failure to address a single scienter argument raised by Ms. Lesjak is telling. They do not respond to the points – and therefore implicitly concede – that: (1) none of the CWs worked with Ms. Lesjak or can provide any insight into

her contemporaneous mental state; (2) the FAC provides no reason why Ms. Lesjak would have made the challenged statements had she known them to be false; and (3) from her perspective as CFO, HP had demonstrated its financial commitment to webOS. Ind. Br. at 43-44.

Of the five scienter arguments offered by Plaintiffs, Opp. at 38, only two (Nos. 3 & 4) even arguably apply to Ms. Lesjak, and both of these fail because they rely upon an inapposite core operations inference. And as each of Ms. Lesjak's statements was forward-looking (Plaintiffs do not even dispute this fact as to Ms. Lesjak's February statements), Plaintiffs bear the burden of showing she had "actual knowledge" that they were false. *Id.* at 40. Plaintiffs argue that the FAC contains the requisite "specific allegations" that Ms. Lesjak had "access to the disputed information that webOS . . . was not working." *Id.* at 42-43.

But in fact the FAC does not reference a single internal report or email discussing development problems alleged to have been shown to Ms. Lesjak, and no CW is alleged to have had a single conversation with her. *Id.* at 43. The only specific allegation Plaintiffs reference with respect to Ms. Lesjak is CW3's claim that she attended a single meeting at which webOS was discussed. Opp. at 45 citing ¶82. Plaintiffs ignore, however, that the FAC contains no allegation that any problems with webOS were discussed at that meeting or that any deadline could not be met. Ind. Br. at 41. Unlike in *Maiman*, therefore, Plaintiffs lack "detailed and specific" allegations that Ms. Lesjak was "exposed to 'factual information within the company' contradicting Defendants' misleading statements'" or that Ms. Lesjak "played an active role in running" webOS. *Maiman*, 2010 U.S. Dist. LEXIS 142712, at *17.

Plaintiffs cannot overcome these deficiencies by referencing Ms. Lesjak's remarks regarding "monitoring." Opp. at 44 citing ¶108. As even a perfunctory analysis reveals, the May 17 statement that "we actively monitor and evaluate all investments against key milestones" was not directed to webOS, and her August 18

statement referred to monitoring the financial performance of new products, not their development. Ind. Br. at 42-43. Again, Plaintiffs fail to address these arguments. Since Ms. Lesjak never claimed that she was "involved in every detail of the company" or that she personally monitored the data that were the subject of the allegedly false statements about webOS, *In re Daou Systems, Inc.,* 411 F.3d 1006, 1022 (9th Cir. 2005) and *Nursing Home Pension Fund, Local 144 v. Oracle Corp.,* 380 F.3d 1226, 1234 (9th Cir. 2004), are inapposite. Opp. at 44. Moreover, unlike *Daou* and *Oracle*, this is not an accounting fraud case, and thus there is no reason to assume a CFO's knowledge. Ind. Br at 43; *In re Cadence Design Sys., Inc., Sec. Litig.,* 654 F. Supp. 2d 1037, 1048 (N.D. Cal. 2009) (inference not applicable where complaint did not show defendant "was deeply involved in the details").

Nor have Plaintiffs addressed their failure to show that the purported problems with webOS were "of such prominence that it would be 'absurd'" to suggest that HP's CFO was unaware of them. *Zucco,* 552 F.3d at 1000.[13] Plaintiffs curiously cite to the Ninth Circuit's decisions in *Zucco* and *Glazer Capital* in support of their argument, Opp. at 43, but these cases demonstrate precisely why the core operations inference is not applicable to Ms. Lesjak. In *Glazer Capital,* the Ninth Circuit found that the core operations inference was inapplicable because it "would not be 'absurd to suggest' that [the CEO] was unaware of the details of payments made through foreign sales agents in Asia." *Glazer Capital Mgmt., L.P. v. Magistri*, 549 F.3d 736, 747 (9th Cir. 2008). Similarly, in *Zucco,* the core

[13] Plaintiffs suggest that Ms. Lesjak would have been aware of the webOS issues because of the billions spent to acquire Palm and ultimately written off relating to webOS. Opp. at 42-44. The issue is not, however, whether Ms. Lesjak was aware of webOS and its subsequent failure. The issue is whether she believed HP was committed to webOS at the time of her challenged statements. Notably, a large part of the write-down was due to expenses HP was pre-obligated to pay to suppliers, which actually demonstrated HP's commitment to webOS. Ind. Br. at 43.

operations inference could not be applied because:

> There is no indication that the differences between the 'preliminary project' stage, the 'application development' stage, and the 'post-implementation' stage of a software project would be operationally visible to executives not intimately connected with the development process. . . .

552 F.3d at 1001.

The same is true here. Ms. Lesjak was not "intimately connected with the [webOS] development process." *Id*. She does not have a technical background. There is no indication that the purported issues with webOS would have been visible to Ms. Lesjak as CFO or that she would have realized that any such issues were serious enough that her statements about HP's intentions for webOS were false. *See, e.g.*, *Berson,* 527 F.3d at 989 ("Where defendants make cheerful predictions that do not come to pass, plaintiffs may not argue, based only on defendants' prominent positions in the company, that they ought to have known better.").

B. <u>There Is No Strong Inference Of Scienter As To Mr. Apotheker</u>

As explained in the moving papers, Ind. Br. at 10-16, the allegations against Mr. Apotheker fail to raise an inference of scienter anywhere close to as compelling as the innocent contrary inference. Mr. Apotheker's statements that the TouchPad and webOS were outstanding products do not support an inference of scienter because they are based entirely on the unreliable or implausible statements of CWs and because the timing of the allegations does not demonstrate his knowledge of their purported falsity. Ind. Br. at 11-12.

Mr. Apotheker's statements about HP's commitment to webOS lead nowhere for Plaintiffs either. For example, as explained, the statement that Mr. Apotheker would "shut down" the TouchPad if it was not working by the end of the year makes more sense, in the context of an impending release of the iPad 2, as a

motivational speech to employees than a sinister plot to defraud investors. Ind. Br. at 12-13. Further, to the extent the CW's report of this statement can even be credited given the unreliability of the source, it is clearly described by the FAC as relating to the TouchPad, not webOS generally. Given that Plaintiffs have now all but abandoned their TouchPad allegations, this comment simply has no relevance to, much less supports a compelling inference of, scienter with regard to statements about the overall future of webOS. And his statements about the release of webOS on printers and PCs (including the "beta version" quote) cannot support an inference of scienter in light of the fact that Mr. Apotheker ultimately made clear that he expected no release before 2012 and that HP ***did*** have teams working to develop these products. Ind. Br. at 13-15.

Importantly, Mr. Apotheker is not alleged to have received ***any*** personal or financial benefit from his purported wrongdoing. In this context, the innocent inference of a business decision that failed to pan out rings far more true. Whether or not "motive" is a strict requirement for demonstrating scienter under the PSLRA, Opp. at 38 n.15, the utter absence of a plausible story regarding why Mr. Apotheker would act with any intent to defraud leads to the inexorable conclusion that the only fair and logical inference is the innocent one.

C. There Is No Strong Inference Of Scienter As To Mr. Bradley

The moving papers, Ind. Br. at 29-30, challenged Plaintiffs to demonstrate why the relevant facts, considered in their entirety, support a cogent inference of fraud as to Mr. Bradley – let alone one as compelling as any opposing inference. *Tellabs*, 551 U.S. at 325-26; *Zucco*, 552 F.3d at 991-92. The Opposition makes clear that Plaintiffs cannot meet that challenge.

As discussed above, *see* § III(D), *supra*, Plaintiffs are unable to show that the CWs have information demonstrating that Mr. Bradley knew that any of his statements were false when made. *Zucco*, 552 F.3d at 995. Similarly, Plaintiffs' "temporal proximity" argument – designed to show that Mr. Bradley must have

known at the time of his July 2011 statements that HP was planning to discontinue webOS, Opp. at 40-42 – is nothing but impermissible "fraud by hindsight" unsupported by particularized facts, witnesses or documents. *Ronconi*, 253 F.3d at 430, 437. That conclusion is buttressed by the FAC itself, which relies on (and quotes) an August 19, 2011 news article, ¶93, stating that, "until a few days ago . . . ***Mr. Bradley knew nothing of these plans*** [to discontinue webOS]." Bagosy Decl. Ex. 1; Supp. RJN. Thus, Plaintiffs' own pleading permits just one reasonable inference: that Mr. Bradley honestly believed his statements were accurate when made.

For the same reasons, Plaintiffs' perfunctory effort to invoke the "core operations" inference as a basis for pleading scienter as to Mr. Bradley, Opp. at 42, is futile. *See* §IV(B), *supra*. Not only are Plaintiffs unable to show that the inference is applicable here, the allegations of the FAC – including reliance on the August 19 article – are incompatible with the suggestion that Mr. Bradley "must have known" that problems with webOS were so significant that the project was somehow doomed to failure. *Zucco*, 552 F.3d at 1001; *Glazer*, 549 F.3d at 746.

Additionally, an inference of scienter is further negated where – as here – Mr. Bradley and the other Defendants are not alleged to have profited in any way from the alleged misconduct. *See, e.g.*, *Downey*, 2009 WL 2767670, at *14; *Tibco*, 2006 WL 1469654, at *21. Tellingly, the Opposition ignores these authorities. Nor do Plaintiffs ever try to explain why Mr. Bradley would deliberately misrepresent the status of webOS development if he knew (as the FAC suggests) that the truth would inevitably be revealed. *Cement Masons & Plasterers Joint Pension Trust v. Equinix, Inc.,* No. C 11-01016, 2012 WL 685344, at *8 (N.D. Cal. Mar. 2, 2012) ("Plaintiffs' allegations of fraud are further undercut by the fact that the FAC does not explain why Defendants would knowingly overstate their forecasts … only to

reveal the truth just ten weeks later.").[14] Thus, the Opposition confirms that Plaintiffs are unable to plead a strong inference – or, for that matter, even a weak inference – of scienter as to Mr. Bradley.

VII. THERE CAN BE NO CLAIM BASED ON FORWARD-LOOKING STATEMENTS THAT WERE IDENTIFIED AS SUCH AND ACCOMPANIED BY MEANINGFUL CAUTIONARY LANGUAGE

Even if Plaintiffs had alleged the existence of a material misrepresentation made with actual knowledge, claims based on a number of challenged statements still should be dismissed under the PSLRA's safe harbor because they were identified as forward-looking and accompanied by meaningful cautionary language. *Impac*, 554 F. Supp. 2d at 1098 citing 15 U.S.C. § 78u-5(c)(1)(A); Ind. Br. at 9, 24-25, 38 (identifying challenged statements made on February 22, 2011, March 14, 2011, May 17, 2011 and June 8, 2011 as protected by the first prong of the safe harbor). As described previously, *see* § IV(A), *supra*, all of the challenged statements are forward-looking. Thus, the safe harbor applies to Defendants' statements. Plaintiffs seek to avoid this result by arguing that Defendants had actual knowledge of falsity and that the challenged statements were neither identified as forward-looking nor accompanied by meaningful cautionary language.

Contrary to Plaintiffs' assertion, Opp. at 15, "[t]he defendants' state of mind

[14] Plaintiffs hypothesize that perhaps Defendants were motivated to make false statements in order to "compete in the rapidly growing market for mobile, web-connected devices." Opp. at 41 n.17. Such speculation, offered without supporting factual allegations, does not begin to meet Plaintiffs' burden under the PSLRA and *Tellabs*. *See, e.g., In re Hansen Natural Corp. Sec. Litig.*, 527 F. Supp. 2d 1142, 1155 (C.D. Cal. 2007). In any event, it does not explain why Defendants would make false statements if they knew the truth would inevitably be revealed. *Equinix*, 2012 WL 685344, at *8. Interestingly, though, Plaintiffs pile on more speculation: they muse that perhaps Defendants disclosed the "truth" only after "it became apparent that reality could not catch up to their false pronouncements." Opp. at 41 n.17. Putting aside the absence of supporting facts, Plaintiffs' own conjecture would actually ***eviscerate*** any claim that Defendants knew prior to August 2011 that HP could not successfully develop webOS.

is not relevant" to the first prong of the safe harbor, which examines only whether forward-looking statements were identified as such and accompanied by meaningful cautionary language. *Cutera*, 610 F.3d at 1113.

The contention that although the statements were forward-looking, they were somehow not identified as such, Opp. at 13-14, is only directed toward the statements on March 14, 2011 and May 17, 2011 (thus implicitly conceding that the statements made on February 22, 2011 and June 8, 2011 were sufficiently identified). In any event, the argument is without merit. The Opposition admits that listeners were expressly advised at the outset of the March 14 Summit that Mr. Apotheker's and Mr. Bradley's comments might include "forward looking information that involves risk, uncertainties and assumptions" and that listeners were directed to HP's March 11, 2011 10-Q for a discussion of relevant risks. Plaintiffs insist, however, that the admonition was too "generic." Opp. at 14. Similarly, Plaintiffs admit that at the outset of the May 17 call, Defendants provided investors with a similar warning that the "call may include forward-looking statements." Opp. at 13. But Plaintiffs apparently contend this warning was "boilerplate" as well. Tellingly, Plaintiffs cite no statutory or case authority for that proposition, and for good reason: there is none. The statute merely provides that statements be "identified as . . . forward-looking," without imposing any further itemization or specification requirement. 15 U.S.C. § 78u-5(c)(1)(A)(i). Indeed, courts apply the safe harbor where statements are "identified" in just this way. *See, e.g.*, *Emp'rs Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1132-33 (9th Cir. 2004); *Desai v. Gen. Growth Props., Inc.*, 654 F. Supp. 2d 836, 846 (N.D. Ill. 2009); *Beaver Cnty.*, 2009 WL 806714, at *11; *In re Copper Mountain Sec. Litig.,* 311 F. Supp. 2d 857, 880-81 (N.D. Cal. 2004).

Equally fruitless is Plaintiffs' contention that the cautionary language in the

10-Qs and the May 17 call was not "meaningful." Opp. at 15-16.[15] The Opposition does not address the actual risk disclosures (indeed, it does not even identify any relevant language from the May 17 call at all),[16] let alone demonstrate the disclosures "'lacked meaning' or were not 'specific' enough." *Tibco*, 2006 WL 1469654, at *27. Instead, Plaintiffs do little more than mention a few snippets of the cautionary language before labeling it "boilerplate" without any supporting analysis. *Cutera*, 610 F.3d at 1112 (plaintiff may not rely on a "conclusory allegation" that disclosures were not meaningful). In fact, HP, among other things: described specific risks related to the Palm business unit; warned of "quality or other defects [that] may not be supported adequately by application software"; and explained the possibility of "defects in . . . engineering, design and manufacturing." Ind. Br. at 38-39. Plaintiffs' own authority rejects their "cherry-picking" examples of general language while "ignor[ing] a host of more particular cautionary statements." *In re Splash Tech. Holdings, Inc. Sec. Litig.*, No. C 99-00109, 2000 WL 1727377, at *11 (N.D. Cal. Sept. 29, 2000) (cited in Opp. at 13).

Further, contrary to Plaintiffs' suggestion, Opp. at 14, "the law does not require specification of the particular factor that ultimately renders the forward-looking statement incorrect." *In re Nuvelo, Inc., Sec. Litig.*, No. C 07-4056, 2008 WL 5114325, at *16 (N.D. Cal. Dec. 4, 2008). Rather, the cautionary language must identify important factors of similar significance to those actually realized. *Clorox*, 353 F.3d at 1133; *Equinix,* 2012 WL 685344, at *5; *Copper Mountain*, 311 F. Supp. 2d at 882. As discussed in the moving papers, the detailed risk factors in the March 11 and June 8, 2011 10-Qs and the 2010 10-K (RJN, Ex. 1 at 14, 15, 18 27; RJN, Ex. 3 at 113-29; RJN, Ex. 8 at 72-73), more than meet that standard. Ind.

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[15] Again, the Opposition does not contend that there were any flaws with the cautionary language accompanying the February 22, 2011 statement.

[16] Plaintiffs appear to have conflated the May 17 conference call transcript with the March 11 and June 8 10-Qs, identifying only the former but quoting only from the latter. Opp. at 16.

Br. at 9, 24-25, 38-39. Accordingly, the safe harbor criteria are satisfied, and it precludes liability for statements on February 22, 2011, March 14, 2011, May 17, 2011 and June 8, 2011.

VIII. THE FAC FAILS TO ALLEGE A SECTION 20(a) CLAIM

Plaintiffs cannot state a Section 20(a) claim against the Individual Defendants because they do not allege an underlying violation of the federal securities laws. *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 978 (9th Cir. 1999); *Pittleman*, 2009 WL 648983, at *4. In addition, the Section 20(a) claims against Ms. Lesjak and Mr. Bradley fail because Plaintiffs have not demonstrated the necessary control.

A. Plaintiffs Have Not Shown That Ms. Lesjak Exercised The Requisite Control

Plaintiffs' boilerplate allegation regarding Ms. Lesjak's CFO title fails to show that she had "actual power or control" over the aspects of HP's business at issue (webOS), Mr. Apotheker (her boss), Mr. Bradley (who is not in Finance), or thus, the allegedly false statements not directly attributed to her. Ind. Br. at 44-45. Plaintiffs do not address the several Central District of California cases cited by Ms. Lesjak on this point. *Id*. citing *Downey*, 2009 WL 2767670, at *15; *In re Toyota Motor Corp. Sec. Litig.*, No. CV 10-922, 2011 WL 2675395, at *5 (C.D. Cal. July 7, 2011), and *Hansen Natural*, 527 F. Supp. 2d at 1163. Indeed, other recent cases from around this Circuit hold similarly.[17]

[17] *See, e.g.*, *In re VeriFone Holdings, Inc. Sec. Litig.*, No. C 07-6140, 2011 WL 1045120, at *16 (N.D. Cal. Mar. 22, 2011) (dismissing Section 20(a) claims against former CFO where supply chain controller's manual adjustments caused errors); *Alberts v. Razor Audio, Inc.*, No. Civ. S-10-1215, 2012 WL 530427, at *6 (E.D. Cal. Feb. 17, 2012) ("Alberts contends that Montgomery was a controlling person by virtue of his position as CFO and his relationship with other cross-defendants. Alberts has failed to allege sufficient facts . . .").

Instead of addressing this case law, Plaintiffs rely primarily on *Metawave,* 298 F. Supp. 2d 1056. *Metawave*, however, demonstrates why Plaintiffs' control person claim fails as to Ms. Lesjak. That court held: "At the motion to dismiss stage, general allegations concerning an individual defendant's title and responsibilities are sufficient to establish control. ***However, Liang's titles of President of World Trade and Vice President for Worldwide operations do not establish that Liang had control***." *Metawave*, 298 F. Supp. 2d at 1091. The allegations in *Metawave* involved misstatements concerning product demand and revenue recognition, and there was no indication that "Liang's position involved revenue recognition, inventory accounting, or the issuance of Metawave's financial statements." *Id*. Analogously, the allegation that Ms. Lesjak serves as HP's CFO fails to establish the requisite control because the FAC focuses not on financial statements, but on statements concerning product development. The only other case cited by Plaintiffs on this subject – *Petrie v. Electronic Game Card Inc.*, No. SACV 10-00252, 2011 WL 165402 (C.D. Cal. Jan. 12, 2011) – does ***not*** state that a mere allegation of title is sufficient to state a control person claim; in fact, that court explicitly relied upon the fact that the company had "no more than ten employees." *Id*. at *6; *compare* ¶34 ("HP is among the world's largest information technology companies, with operations in more than 170 countries and $127.2 billion in revenue . . . .").

Finally, Ms. Lesjak's May 17, 2011 statement that "***we*** actively monitor and evaluate all investments against key milestones" does not suggest that ***Ms. Lesjak herself*** "closely monitored the progress of webOS." Opp. at 48. Such linguistic alchemy should not be countenanced; "we" does not mean "I," particularly at a firm the size of HP. Moreover, as explained in § VI(A), *supra*, this statement did not even refer to webOS.

At its core, Plaintiffs would find control person liability for Ms. Lesjak based on her title – that is not the law.

B. Plaintiffs Have Not Shown That Mr. Bradley Exercised The Requisite Control

Just as Plaintiffs rely on boilerplate allegations and a title to show control as to Ms. Lesjak, they once again trot out their boilerplate assertions, arguing that Mr. Bradley "exercised actual power and control" over HP through his "position" as Executive Vice President, Personal Systems Group. Opp. at 47-48. However, as noted before, such conclusory assertions of Mr. Bradley's position are insufficient to state a claim under Section 20(a). *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1163 (9th Cir. 1996).

Likewise, and contrary to Plaintiffs' assertion, the FAC provides no information from confidential witnesses, no documents, and no other particularized facts establishing that Mr. Bradley closely monitored webOS. Rather, to the extent the FAC sheds any light on that subject, it actually says the opposite. *See* § VI(C), *supra* (FAC quotes a news source indicating that Mr. Bradley knew nothing of the plans to discontinue webOS until a few days before the announcement was made). Moreover, the Opposition has no response to Mr. Bradley's argument that the FAC alleges no facts establishing that he had authority over HP's SEC filings, press releases or conference calls, or that he had any ability to direct the activities of Mr. Apotheker or Ms. Lesjak. Ind. Br. at 31 citing *In re Int'l Rectifier Corp. Sec. Litig.*, No. CV 07-02544, 2008 WL 4555794, at *22 (C.D. Cal. May 23, 2008). Finally, Plaintiffs make no effort to square their conclusory averments of Mr. Bradley's purported control over HP (and the other Defendants) with their explicit reliance on the August 19, 2011 *All Things Digital* article stating that Mr. Bradley did not learn of the plan to discontinue webOS until a few days before the August 18, 2011 announcement. ¶93; Bagosy Decl. Ex. 1; Supp. RJN. Needless to say, alleging that Mr. Bradley learned of the decision a few days before its announcement is thoroughly inconsistent with the notion that he controlled or directed the "day-to-day affairs" of HP. *Paracor*, 96 F.3d at 1163.

IX. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motions to dismiss the FAC.

Dated: July 11, 2012

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By /s/ Robert E. Gooding, Jr.

ROBERT E. GOODING, JR.
JENNIFER R. BAGOSY
5 Park Plaza, Suite 1750
Irvine, CA 92614

MARC J. SONNENFELD (Admitted *Pro Hac Vice*)
KAREN PIESLAK POHLMANN (Admitted *Pro Hac Vice*)
1701 Market St.
Philadelphia, PA 19103-2921

MONIQUE E. CHO
300 South Grand Avenue
Los Angeles, CA 90071-3132

GIBSON, DUNN & CRUTCHER, LLP
DEAN J. KITCHENS
DANIEL S. FLOYD
DAVID HAN
333 South Grand Avenue
Los Angeles, CA 90071-3197

Attorneys for Defendant
HEWLETT-PACKARD COMPANY

Dated: July 11, 2012

WILSON SONSINI GOODRICH & ROSATI, P.C.

By /s/ Steven M. Schatz

STEVEN M. SCHATZ (SBN 118356)
BORIS FELDMAN (SBN 128838)
KATHERINE L. HENDERSON (SBN 242676)
BRIAN DANITZ (SBN 247403)
BRYAN J. KETROSER (SBN 239105)
650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300
Fax: (650) 565-5100
E-mail: sschatz@wsgr.com
bfeldman@wsgr.com
khenderson@wsgr.com
bketroser@wsgr.com
bdanitz@wsgr.com

Attorneys for Defendant
CATHERINE A. LESJAK

Dated: July 11, 2012

MUNGER, TOLLES & OLSON LLP

By /s/ Gregory J. Weingart

BRAD D. BRIAN (SBN 079001)
GREGORY J. WEINGART (SBN 157997)
LAURA D. SMOLOWE (SBN 263012)
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071-1560
Tel: 213.683.9100
Fax: 213.593.2971
E-mail: brad.brian@mto.com
gregory.weingart@mto.com
laura.smolowe@mto.com

Attorneys for Defendant
LÉO APOTHEKER

Dated: July 11, 2012

FENWICK & WEST LLP

By /s/ Kevin P. Muck

KEVIN P. MUCK (SBN 120918)
MARIE C. BAFUS (SBN 258417)
555 California Street, 12th Floor
San Francisco, CA 94104
Tel: 415.875.2384
Fax: 415.281.1350
E-mail: kmuck@fenwick.com
mbafus@fenwick.com

Attorneys for Defendant
R. TODD BRADLEY